Abstract – Doctoral thesis

The control of imbalances in business-to-business contrats
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A comparative law study of the reformed French and German contract law

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The traditional ideal of the voluntary and therefore fair contract (idea of the "guarantee of correctness"), which is based on contractual freedom and expresses private autonomy, is no longer mandatory. Due to today's economic and social circumstances, a party can impose disadvantageous clauses on its contractual partner and cause the contract to be unbalanced. The contractual freedom is therefore inherently subject to the risk of its abuse. While a control of such imbalances in the presence of a voluntary conclusion of a contract is ruled out in general precisely because of the principles of contractual freedom and private autonomy, this work has analysed two selected constellations in which, as a result of a restriction of the actual freedom of decision, there is no material contractual freedom and, consequently, no procedural contractual justice: on the one hand, the use of unilaterally predetermined, non-negotiable clauses (*first* constellation) and, on the other hand, the deliberate abuse of a party's weakness by the other party (*second* constellation). In these cases the impairment of the freedom of decision justifies the interference with the freedom of contract and the contractual binding effect.

This is not new to German law, which contains with the control of general terms and conditions (Allgemeine Geschäftsbedingungen, AGB) pursuant to §§ 305 et seq. BGB a solution for the *first* and with the usury (Wucher) pursuant to § 138 (2) BGB as well as the figure of the usurious-like business (wucherähnliches Geschäft) according to § 138 (1) BGB a solution for the *second* constellation. In contrast to this, the French law knew until 2016 only mechanisms scattered over various codes of law and connected to party characteristics. The French Code civil (C. civ.) contains only since the first comprehensive reform of its contract law since the creation of the Code 1804 under *Napoléon* by the Ordonnance No. 2016-131 of 10 February 2016 and its ratification by Law No. 2018-287 of 20 April 2018 with Art. 1171 C. civ. (and Art. 1170 C. civ.) norms for the control of contractual imbalances in the *first* constellation and with Art. 1143 C. civ. a regulation of the second constellation. The new therefore lies in French law.

On the occasion of this reform, the study examines the following, functionally comparative legal research question: In what way and under what conditions do the German general contract law of the BGB and the reformed general contract law of the C. civ. carry out a content control in business-to-business (B2B) contracts to protect the disadvantaged party in the two constellations mentioned, what similarities and differences can be identified and what orientation and inspiration possibilities for German law arise from the French solution after an analytical evaluation of both legal systems? The tailoring to B2B contracts is thereby owed to the unification of clause control in business-to-consumer contracts under European law. In order to answer these questions, the work contains a first part, which serves to describe the reform of 2016 and 2018, and two main parts, in which the solutions of both legal systems for the two constellations are presented and analysed within the framework of a simultaneous legal comparison.

The legal comparison of the *first* constellation on the control of contractual imbalances by non-negotiable, predetermined clauses has shown that French contract law, governed by Art. 1171 C. civ., strongly follows the German §§ 305 ff. BGB. Above all, it should still be emphasised that both solutions reveal weaknesses at the level of the material scope of application: While in German law the interpretation of the AGB characteristic of "individual negotiation" within the meaning of § 305 (1) sentence 3 BGB by the Federal Court of Justice is to be rejected as too narrow due to its incompatibility with business legal transactions, the linking of the French scope of application to a so-called "*contrat d'adhésion*" within the meaning of Art. 1110 (2) C. civ., i.e. to a contract as a whole, contradicts the telos of the French review of clauses. For German law, it was elaborated that in B2B-contracts a "negotiated" clause, deviating from the standard of the Federal Court of Justice, must be subject to a free and self-determined decision. At the level of the facts, there is also a need for more flexibility in the AGB control, which respects the differentiation requirement of § 310 (1) sentence 2 BGB and does not give the consumer-law clause catalogues of §§ 308, 309 BGB any presumption effect. For this purpose, the legal comparison has shown, inter alia, a possibility of relaxing the strict "foreseeability formula" of the Federal Court of Justice for § 307 (2) no. 2 BGB by orienting itself on the standard of Art. 1170 C. civ.

The comparative legal examination of the *second* constellation of the deliberate abuse of the weakness situation of a party also revealed a fundamental convergence of the French solution with the German solution - particularly at the level of the facts - but at the same time identified differences which in part reveal weaknesses in the German approach. A fundamental systematic difference lies in the fact that usury and business similar to usury are linked to the immorality according to § 138 BGB, whereas Art. 1143 C. civ. classifies this constellation of abuse as a special case of the lack of agreement „*violence*“. The latter is artificial and does not contribute to the comprehensibility of French contract law. Though, the decisive difference has been shown on the legal consequences side: While § 138 BGB and Art. 1143 C. civ. both lead to the retroactive invalidity of the entire contract, this legal consequence occurs ipso iure in German law and as *nullité relative* only at the request of the disadvantaged party in French law. The French solution is more advantageous, particularly with regard to the telos of protection of the disadvantaged party. Hence, orientation towards this in form of a right of rescission of the disadvantaged party is appropriate for German law. In the course of a therefor necessary separation of the usurious offence from the immorality according to § 138 BGB, the two-pronged approach of German law, which differentiates between usury and usurious-like business without - as the legal comparison has shown - resulting in added value, could also be abandoned.

Despite the differences that have been identified, some of which are fundamental, a clear convergence of French contract law with German contract law can be observed for the two constellations examined as a result of the 2016 reform, which will facilitate rather than complicate future efforts to harmonise European contract law.